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WHEN A MOTHER IS A LEGAL STRANGER TO HER CHILD: THE LAW'S CHALLENGE TO THE LESBIAN NONBIOLOGICAL MOTHER

Carmel B. Sella*

We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the context of those terms and destructive to pretend that we do.¹

For four years, Alice and Pat² planned to have a child together. The women are lovers; Alice is a nurse, Pat is a project manager at a non-profit organization. The decision to have a child was not an uncomplicated one, but rather the outcome of extensive consideration, careful selection of a sperm donor, and the arrangement of many practical details, such as obtaining time off from work for child care and moving from San Francisco to a larger house in Oakland. Together the two women attended birthing classes, painted their future baby's room, and considered possible

* J.D. candidate, UCLA School of Law, 1992; M.A., London School of Economics, 1985; B.A., Wesleyan University, 1984. I wish to thank Grace Blumberg for her patient guidance and high standards, Chris Littleton for her thoughtful comments and encouragement, and Mary Newcombe both for sharing the resources and work of Lambda Legal Defense and Education Fund and for setting such a good example of how law and activism can be combined. Additionally, my thanks and appreciation to fellow *Journal* members for their commitment to transforming an idea into a reality. Thanks especially to Michael Giden for his support, advice, and enduring friendship.

1. Michael H. v. Gerald D., 109 S. Ct. 2333, 2351 (Brennan, J., dissenting).

2. The author wishes to thank the couple represented in this Article for their cooperation and openness in discussing their decision to have a child and the issues associated with their son's birth. Their real names have not been used in order to protect their privacy.

names. Finally, after what felt to them like far longer than nine months of pregnancy, Jeremy was born.

At the moment of Jeremy's birth, however equal the women's happiness and commitment to their son, Alice and Pat possessed qualitatively unequal legal status. Alice, as Jeremy's biological mother,³ automatically acquired all the rights and obligations associated with being a parent. In contrast, as Jeremy's nonbiological mother, Pat has no legally cognizable parental rights. Pat's lack of parental status stems from the law's failure to accommodate couples that cannot legally marry⁴ or choose not to marry,⁵ in which one

3. This Article refers to the childbearer as the biological mother rather than the "natural" mother. This word choice reflects the author's view that the word "natural" is value-laden and reflects the legal and social bias in favor of the childbearer.

4. No court nor any state legislature sanctions same sex marriages. Sullivan, *Same Sex Marriage and the Constitution*, 6 U.C. DAVIS L. REV. 275 (1973). Prospects for the legal recognition of gay marriages are uncertain. Domestic partnership measures, which grant only limited legal benefits to gay and lesbian couples, face electoral resistance. For example, the 1990 passage of a domestic partnership bill by the San Francisco Board of Supervisors provoked a backlash in the form of a voter referendum. When put on the ballot, the measure was narrowly defeated. L.A. Times, Nov. 9, 1989, at A1, col. 1. A weakened version of the bill which provides for registration of nonmarried couples passed in November 1990. UPI, Nov. 7, 1990 (LEXIS, Nexis, Current file).

At present, nine cities have domestic partnership laws which vary in scope. They are: Berkeley, California; Ithaca, New York; Madison, Wisconsin; Minneapolis, Minnesota; San Francisco, California; Santa Cruz, California; Seattle, Washington; West Hollywood, California; Takoma Park, Maryland. Boston Globe, Dec. 8, 1990, at 29, col. 2. See also 16 Pension Rep. (BNA) No. 6 at 280 (Feb. 11, 1991).

In addition to electoral obstacles, legal recognition of gay and lesbian marriages may be hampered by a divergence within the gay and lesbian community over whether legally recognized marriages should even be sought. Some lesbians and gays advocate same sex marriage because of the view that gays and lesbians are entitled to the same economic and political benefits available to heterosexual married couples. It is further argued that gays and lesbians should have the *right* to marry despite the personal reservations some gays and lesbians may have regarding the desirability of marriage. See Stoddard, *Why Gay People Should Seek the Right to Marry*, 6 OUTLOOK 8 (1989). See also Friedman, *The Necessity of State Regulation of Same-Sex Marriage*, 3 BERKELEY WOMEN'S L.J. 134, 137-44 (1987-88). Those who oppose same sex marriage have argued that it represents a false path to liberation by encouraging the assimilation of gays and lesbians into the mainstream. Accordingly, same sex marriage is rejected because it implies an endorsement of the state's regulation of relationships. See, e.g., Ettelbrick, *Since When is Marriage a Path to Liberation?* 6 OUTLOOK 8 (1989). See also Isaacson, *Should Gays Have Marriage Rights? On Two Coasts, the Growing Debate Produces Two Different Answers*, TIME, Nov. 20, 1989, at 101-02. A measure which would allow same sex couples to marry was introduced in the California Assembly in December 1990. A.B. 167, 1991-92 Sess. (Would amend CAL. CIV. CODE § 4100 by removing gender references in the definition of marriage.).

5. See Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207, 208. ("Some people choose to not marry because they want to focus on their careers; others, especially feminists, have come to appreciate the funda-

party is not genetically related to a child. Acquiring parental rights through adoption is not available to a nonbiological parent such as Pat. Under present law, an individual may not adopt a child without the biological parent of the same sex relinquishing all parental rights.⁶ Thus, adoption bars a lesbian couple from asserting and maintaining co-extensive parental rights.⁷

In the absence of systematic legal recognition of her parental status, a nonbiological mother must resort to *ad hoc* means of gaining legal recognition of her functional parental status as caregiver to her child. For example, with Alice's approval, Pat could fill out a medical consent form or obtain power of attorney to secure limited authority in seeing to Jeremy's needs. Alice could also execute a will nominating Pat as Jeremy's guardian.⁸ None of these approaches, however, provides Pat with parental status equal to and simultaneous with that of Alice, nor indeed with the rights to which a male partner of Alice would be entitled. Thus, while functioning

mental and inherent inequality in male-female relations and have opted out." See also A. DWORKIN, INTERCOURSE 158 (1987) ("Marriage is the legal ownership of women, the legal intercourse that is the foundation of male authority.").

6. For example, under California law, "[t]he birth parents of an adopted child are from the time of adoption, relieved of all parental duties toward, and all responsibility for, the child so adopted, and have no right over the child." CAL. CIV. CODE § 221.76 (West 1990). The statute's language dates back to 1872. Adoption law was first codified in the United States in 1865. During this period, 25 states codified adoption and each state law called for the severance of parental rights upon adoption. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 465 (1971). This severance was consistent with the initial purpose of adoption of providing for orphaned or destitute children and serving the needs of childless couples. In such circumstance, adoption created new familial relationships. *Id.* at 472.

Severance serves to replicate the norm of one male and one female parent. As such, "the legal system of adoption . . . traditionally mimic[s], insofar as possible, the conventional nuclear family and its presumed reflection of biological parenthood." Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 320.

Severance works against the goal of shared parenting between parents. Thus, as practiced at present, adoption is not available as a vehicle for the legal recognition of an additional rather than a substitute parent.

7. Even if same sex marriage were legalized, the right of gay and lesbian married couples to co-parent or adopt would not necessarily follow. For example, in Denmark where same sex marriage was legalized in 1989, gay and lesbian couples continue to be denied the right to adopt. Reuters, May 26, 1989 (LEXIS, Nexis library, Current file).

8. A guardian has broad authority over the care and control of her or his charge. For example, California law provides that a guardian "has authority for the care, custody, and control of, and has charge of the education of, the ward or conservatee." CAL. PROB. CODE § 2351 (West 1990). This status, however, does not address the needs of lesbian mothers because the authority of the biological parent ceases upon the appointment of a guardian. CAL. CIV. CODE § 204 (West 1982). Thus, guardianship is not a useful mechanism of asserting parental rights while the biological parent is alive.

on a day-to-day basis as a parent, Pat's rights with respect to Jeremy are at best piecemeal.

In addition to being precluded from making parental decisions on behalf of her child, the nonbiological mother's continuing relationship with her child is legally precarious.⁹ If Alice and Pat end their relationship, Alice could sever Pat's relationship with Jeremy. Also, in the event of Alice's death, Pat would not be able to assert custody or visitation claims. The disparity in legal status between Alice and Pat may also adversely affect Jeremy. For example, to the extent that Pat needs to defer to Alice in making decisions on Jeremy's behalf, Jeremy may regard Pat as less his parent than Alice. As a result, he may trust her less and be less willing to accept her as an authority figure.

Like lesbian nonbiological mothers, stepparents and unmarried heterosexual partners of biological parents are generally unable to assert complete parental rights because they have no genetic relationship to the child. In all these circumstances, the law fails or refuses to recognize existing familial relationships. Legal impediments, however, do not prevent such relationships from forming. As such, the law should recognize this reality rather than continue to ignore it.¹⁰

The parental aspirations of lesbian couples, unlike those of stepparents and unmarried heterosexual couples, are further impeded by societal prejudice toward homosexuals. Ironically, the very desire for legally recognized parental rights turns the stereotypical notion of lesbians and gays as "anti-family" on its head; present law, rather than the supposed deviance of lesbians and gays, acts as a barrier to the formation of families. Compounding this problem is the Supreme Court's inconsistent approach to laws grounded in private biases. While rejecting laws based on private

9. There are also considerable emotional effects caused by the lack of recognized parental rights. In her study of lesbian mothers, McCandish observes that:

During the symbiotic period . . . [a]lthough the nonbiological parent was clearly bonded to the child and performed 40 to 50 percent of the early childcare, she also experienced intense anxiety about whether the child had bonded in return. She reported searching for cues that the child responded to her quieting and presence. Without any defined legal and social role, the partner was wholly dependent on the child's response and the biological mother's expectations to give them a place in the family.

McCandish, *Against All Odds: Lesbian Mother Family Dynamics*, in GAY AND LESBIAN PARENTS 29 (F. Bozett ed. 1987).

10. See generally Polikoff, *The Child Does Have Two Mothers*, 78 GEO. L.J. 459 (1990).

biases in the context of race,¹¹ the Court has been willing to uphold laws which reflect private biases in the context of homosexuality.¹²

This Article addresses how lesbian motherhood defies the law's definition and conceptualization of parenthood. Further, it explores how the law challenges the parental aspirations of nonbiological lesbian mothers and thereby obstructs the formation of lesbian families. It also considers the present means available for nonbiological mothers to achieve parental status, how these methods are satisfactory and how they are not.

The Article focuses on such families as Pat, Alice, and Jeremy, in which a child is conceived through alternative insemination (commonly referred to as artificial insemination)¹³ in the context of an established lesbian relationship. In this circumstance, the two women decided together to have a child, the nonbiological mother was present at her child's birth, and both mothers simultaneously assumed parental roles. The nonbiological and biological mother, then, are in every respect co-parents short of the physical impossibility of a shared genetic relationship to their child. As such, the nonbiological mother's relationship and claims to the child most closely approximate those of her partner who gave birth to their child. The Article further assumes that the semen donor has relin-

11. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (violation of fourteenth amendment to remove child from mother's custody solely because of mother's interracial marriage and the anticipated psychological damage to the child) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

12. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 197 ("nothing in the Constitution depriv[es] a State of the power to enact" a statute criminalizing consensual sodomy).

13. This Article refers to "alternative" rather than "artificial" insemination because "artificial" insemination suggests that conception without intercourse is somehow not real. "Because there is nothing artificial about inseminating a woman, alternative insemination aptly describes a process that is merely an alternative to insemination through sexual intercourse." Polikoff, *supra* note 10, at 467 n.24.

quished all claims to the child¹⁴ such that the family is comprised of two mothers rather than of two mothers and a father.¹⁵

I. LESBIAN MOTHERHOOD

The 1980s witnessed a baby boom in the lesbian community.¹⁶ While the exact number of lesbians who have had children through alternative insemination is not known, it is estimated to total between five and ten thousand.¹⁷ New parenthood sections at gay bookstores and lesbian parenthood conferences and workshops reflect a continuing interest among lesbians and gays in having children.¹⁸

Lesbian motherhood is at once radical and reactionary. It is radical in the sense that lesbian couples are now empowered to create families in the absence of a male figure. As Adrienne Rich observes: "to acknowledge that a lesbian can be a mother and a mother a lesbian, contrary to popular stereotypes; to question the dictating by powerful men as to how women . . . shall use their bodies . . . is to challenge deeply embedded phobias and prejudices."¹⁹ Yet, lesbian motherhood is reactionary in that lesbian couples are now replicating heterosexual norms and fulfilling women's traditional function as mothers. As such, lesbians partici-

14. While a nonbiological mother serves as a functional parent yet has no biological relationship to her child, the sperm donor has a biological relationship absent a functional parental role. The extent to which the law values this biological relationship is evident in the parental rights which a sperm donor is granted if he has contributed sperm to a woman for artificial insemination without the intervention of a licensed physician. *See e.g.*, *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 391, 224 Cal. Rptr. 530, 533 (1986) (semen donor granted visitation rights over lesbian mother's objection); *In re R.C.*, 775 P.2d 27, 35 (Colo. 1989) (*en banc*) (parental rights of semen donor not extinguished by statute if mother agreed to recognize donor as child's natural father at time of insemination); *C.M. v. C.C.*, 152 N.J. Super. 160, 168, 377 A.2d 821, 824-25 (1977) (*per curiam*) (semen donor entitled to visitation rights as natural father). In California, when a sperm donor has provided sperm to a licensed physician, the sperm donor relinquishes the right to assert parental rights. CAL. CIV. CODE § 7500(b) (West 1983).

15. This Article's exclusive focus on lesbian families is not meant to suggest that gay men do not also desire to become parents. A discussion of gay fathers, however, is beyond the scope of this Article.

16. N.Y. Times, Jan. 30, 1989, at A13, col. 1.

17. Seligmann, *Variations on a Theme*, NEWSWEEK, Spec. Ed. Winter/Spring 1990, at 39.

18. The advent of lesbian and gay families has led to the establishment in New York of Center Kids, a resource center and support network for lesbian and gay parents and their children. At present, Center Kids is comprised of 200 families. N.Y. Newsday, July 13, 1989, Part II, at 8. For information, write: Center Kids Publications, Lesbian and Gay Community Services Center, 208 West 13th Street, New York, N.Y. 10011.

19. A. RICH, ON LIES, SECRETS, AND SILENCE 197 (1979).

pate in a system in which "all women are seen primarily as mothers; all mothers are expected to experience motherhood unambivalently and in accordance with patriarchal values; and the 'nonmothering' woman is seen as deviant."²⁰ Thus, while their sexual orientation and politics may place lesbians at odds with societal norms, motherhood may work to place lesbians in harmony with these norms.²¹

In contrast to the biological lesbian mother who enjoys the approval society confers on all childbearers, the nonbiological mother receives none. Thus, she incurs the responsibilities of parenthood through day-to-day care for her child without any societal validation of this role. Legal recognition of her status would correct this imbalance by affirming the nonbiological mother's legitimacy as one of the child's two legal mothers.

Just as lesbian motherhood has political implications, so too does the manner in which the nonbiological mother seeks parental rights. Obtaining parental rights through existing doctrines or institutions represents a choice of conforming to a structure in which the traditional family is the norm and a lesbian household is a deviation. Ironically, then, in seeking recognition of her personal/political²² choice, the nonbiological mother must participate in and

20. *Id.* See also Polikoff, *Lesbians Choosing Children: The Personal is Political*, in *POLITICS OF THE HEART* 45-50 (S. Pollack and J. Vaughn ed. 1987) ("My own introspection has forced me to recognize that I wanted a child in part because I wanted to be 'normal,' because I wanted to have more in common with other women, and because I didn't want a life so clearly on the fringe of society."). *Id.* at 48.

21. Lesbian parents can avoid the assimilationist effects of the privileges accrued from motherhood by emphasizing, rather than negating, the child's uniqueness and that of his or her family. Audre Lorde writes:

So what makes our children different? We do. Gays and Lesbians of Color are different because we are embattled by reason of our sexuality and our Color, and if there is any lesson we must teach our children, it is that difference is a creative force for change, that survival and struggle for the future is not a theoretical issue. It is the very texture of our lives The children of Lesbians of Color did not choose their Color nor their mamas. But these are the facts of their lives, and the power as well as the peril of these realities must not be hidden from them as they seek self-definition.

Lorde, *Into the Future: There's a Long Road Ahead of Us*, in *POLITICS OF THE HEART*, *supra* note 20, at 314.

Yet, as attentive as lesbians may be to stressing the positive aspects of their family's differences, it remains to be seen what effect lesbian motherhood will have on their own lives. One concern is that, because motherhood is so demanding and requires so great a focus on private lives, motherhood will curtail the participation of lesbians who would otherwise be active in public movements for social change.

22. By now it is perhaps well beyond a feminist cliché to say "the personal is political." The phrase, however, still retains its resonance, especially in the lesbian mother context. Here, private choices have very clear and unavoidable political implications.

be subject to the dictates of the very system to which she may otherwise object.

While the lesbian nonbiological mother's lack of legal rights might originally have been an inadvertent byproduct of historical features of family and adoption law,²³ its perpetuation communicates to lesbians and to society at large that the law will not countenance the formation of lesbian families. Although unable to prevent lesbians from giving birth, the legal system can and does condone the obstacles preventing lesbians from forming legally recognized families. Embedded in these legal obstacles are longstanding attitudes and deeply held beliefs toward homosexuality, parenthood, and marriage. As long as these views remain unchallenged, the law will continue to render the lesbian nonbiological mother invisible and invalidate her parental role.

II. PREVAILING THEORETICAL APPROACHES TO NONBIOLOGICAL PARENTHOOD

The problem of what parental rights to assign to an individual who has served as a child's parent in a functional sense yet has no biological relationship to that child requires a reconsideration of what constitutes parenthood. A number of theories provide an analytic basis for defining parenthood to accommodate nonbiological mothers and fathers. They include inclusive parenthood, nonexclusive parenthood, and intent-based parenthood. These theories confer parental rights based on a nonbiological parent's actions, status, or intent.

Under the theory of inclusive parenthood, parental rights are conferred by an individual's status — as lover to a lesbian biological parent or husband to heterosexual mother — and by acts, in the form of caregiving to her child.²⁴ Under a theory of nonexclusive parenthood, a caregiver gains parental rights by virtue of her actions, though not necessarily because of her status.²⁵ Under both these theories, the nonbiological mother must demonstrate to the court that she has acted as a parent before being recognized as one. This burden of proof denies the lesbian nonbiological mother the presumption of parental status which a male partner of a biological

23. See *supra* note 6.

24. Polikoff, *supra* note 10, at 471-73.

25. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need For Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 882-83 (1984).

parent would enjoy.²⁶ In contrast, under intent-based parenthood, a nonbiological parent's parental status is conferred based on her intent to assume a parenting role.²⁷ Thus, only the intent-based parenthood theory places the nonbiological parent on par with her male, heterosexual counterpart as well as with the biological mother.

A. *Inclusive Parenthood*

One means of reconciling a lesbian nonbiological mother's functional parental role with her legal nonparent status is through the creation of a legal regime in which a nonbiological mother is recognized as a parent. Under a theory articulated by Professor Nancy Polikoff, the definition of parenthood is broadened to enable nonbiological parents such as stepparents and lesbian nonbiological mothers to be deemed parents.²⁸ At the same time, however, parenthood as an exclusive institution is maintained.²⁹ Thus, a child would have only one set of parents, comprised of two or three adults — of the opposite or same sex.³⁰ To Polikoff, exclusive parenthood assures parental autonomy and limits the ability of nonparents to intrude upon the family and assert parental rights.³¹

Under Polikoff's model, parenthood is broadened to include those who maintain "a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature."³² In this way, those outside the traditional boundaries of legal parents — such as stepparents and lesbian nonbiological mothers — would gain parental status.³³

A defect in this feature of Polikoff's model is that the nonbiological mother's parental rights are conferred by the *biological* mother's acts and intent. Thus, the nonbiological mother's parental rights are vested in the biological mother, rather than inhering to the nonbiological mother by virtue of her relationship to her child and to the biological mother.

26. CAL. EVID. CODE § 621 (West 1991).

27. Shultz, *supra* note 6, at 322–23.

28. Polikoff, *supra* note 10, at 464.

29. *Id.* at 471, 473 n.51.

30. *Id.* at 483.

31. *Id.* at 490.

32. *Id.* at 464.

33. *Id.*

Polikoff's approach further calls for "proof of a parent-child relationship that has developed through the cooperation and consent of someone already possessing the status of a legal parent."³⁴ In requiring such proof, Polikoff suggests that a nonbiological lesbian mother is, at least initially, less of a mother than the childbearer. So long as the nonbiological mother must prove her parental status, her parental role will be secondary to the biological mother's, whose parental status is legally presumed.

B. *Nonexclusive Parenthood*

In contrast to Polikoff's exclusive parenthood approach which allows for only one set of parents,³⁵ Professor Katharine Bartlett advocates nonexclusive parenthood.³⁶ Under nonexclusive parenthood, stepparents, foster parents, and related or unrelated caregivers who have formed a parent-child relationship with a child would be considered parents in addition to, rather than as a substitute for, a child's legal parent or parents.³⁷ These additional parents would not sever the child's relationship with her or his legal or biological parents.³⁸

Bartlett limits the expansion of parenthood to circumstances in which "the child's relationship with his legal or natural parent has been interrupted."³⁹ This approach may have utility for an extended family of relatives, or in the foster care and post-divorce context of two sets of families. However, it is inappropriate for lesbian mother families where no interruption of the child-parent relationship has occurred.

Bartlett further states that "the law should also require a demonstration that an adult is the legal, natural, or psychological parent of the child."⁴⁰ "Psychological parent" refers to a child's caregiver "who on a continuing day-to-day basis, through interaction, interplay and mutuality satisfies the child's psychological needs."⁴¹ This role can be "fulfilled either by a biological parent or by an adoptive

34. *Id.* at 471.

35. For a discussion of Polikoff's response to Bartlett's approach see Polikoff, *supra* note 10, at 473 n.51.

36. Bartlett, *supra* note 24, at 882-83.

37. *Id.*

38. *Id.* at 944.

39. *Id.* at 946.

40. *Id.*

41. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 98 (2d ed. 1979) [hereinafter *BEYOND THE BEST INTERESTS*].

parent or by any other caring adult.”⁴² While psychological parenthood recognizes the parental role which a nonbiological mother may fulfill, its requirement of proof of this relationship is problematic. While the biological mother’s status is presumptive, the nonbiological mother must overcome the hurdle of proving her status. Thus, like Polikoff, Bartlett reifies the legal imbalance between the nonbiological and biological mother.

Nonexclusive parenthood is also inadequate from the perspective of lesbian mothers because it suggests a dilution of parenthood among a number of individuals. In contrast, nonbiological mothers seek complete parental status within the context of one set of parents. In addition, nonexclusive parenthood involves no recognition of a relationship between parents. As such, it does not serve to legitimize lesbian relationships and families.

C. *Intent-Based Parenthood*

The theory of intent-based parenthood is premised on a recognition that nontraditional methods of reproduction require, and are susceptible to, a new vision of parenthood.⁴³ Thus, as Professor Marjorie Shultz argues, when conception occurs through alternative insemination or contract birthing, “intentions that are voluntarily chosen, deliberate, express and bargained for ought presumptively to determine legal parenthood.”⁴⁴

This approach recognizes the distinct features which inhere to nontraditional modes of conception. Namely, new reproductive techniques allow “individuals to choose procreative roles independent of their decisions about sexual and, by extension, interpersonal intimacy [P]rocreation can also more readily be seen as severable from the rearing of children.”⁴⁵ Parental status in this circumstance is derived from recognizing and accommodating the distinct features of nontraditional modes of conception and parenthood. As such, it avoids manipulating presently existing parenthood doctrines, premised as they are on traditional birthing techniques.

Intent-based parenthood gives weight to the deliberateness of the parenthood choice required in conception through alternative insemination and contract birthing.⁴⁶ Schultz argues that intent

42. *Id.* at 19.

43. Shultz, *supra* note 6, at 307.

44. *Id.* at 323.

45. *Id.* at 315.

46. Shultz contrasts the deliberateness of the parenthood choice under new reproductive technology with the possible ambiguity associated with traditional procreation.

should be given the force of law through enforcement of private contracting and parenting agreements.⁴⁷

Lesbian families would benefit from the adoption of an intent-based parental doctrine. The status of the nonbiological mother would be established by a showing of her intent to serve as her child's parent rather than by proving her status as a psychological parent. Intent could be demonstrated by such factors as participating in the birth of the child, providing financial support, and assuming full caregiving responsibilities.

Intent-based parenthood, in contrast to Polikoff's inclusive parenthood model and Bartlett's nonexclusive parenthood model, eliminates the power imbalance between the biological and nonbiological mother by not basing parental status on a biological relationship between a parent and child or on a marital relationship between a nonbiological and biological parent. Instead, regardless of biology, the two mothers would be equally recognized as parents based on their intent to share in parenthood.

III. PREVAILING AVENUES TO LEGALLY RECOGNIZED PARENTHOOD

Two powerful factors operate to the detriment of a nonbiological lesbian mother's attempt to establish parental rights under the existing legal system. First, is our society's heterosexism⁴⁸ in the form of the exclusively heterosexual marital privilege.⁴⁹ Second, is the great importance placed on a genetic link in conferring parental status.⁵⁰ These two factors act as substitutes for one another: the

Procreation by ordinary coital means necessarily includes a degree of ambiguity regarding purpose. On the one hand, sexual relations have been the sole means to procreate. On the other, sexual relations are often either an end in themselves or a means to some [other] end Thus, procreation may be a goal or a by-product, or anything in between.

Id. at 308.

47. *Id.* at 302-03.

48. Heterosexism refers to a presumption that only heterosexuality exists and a concomitant refusal or inability to acknowledge homosexuality and bisexuality. Heterosexism is distinguishable from homophobia which refers to a hatred and fear of homosexuals. Audre Lorde defines these terms in the following way: "Heterosexism: The belief in the inherent superiority of one pattern of loving and thereby its right to dominance Homophobia: The fear of feelings of love for members of one's own sex and therefore the hatred of those feelings in others." A. LORDE, *Scratching the Surface: Some Notes on Barriers to Women and Loving*, in SISTER OUTSIDER 45 (1984).

49. See *supra* note 4.

50. While the birthing process and breast feeding may well give the biological mother a unique and special bond to a child, the question is whether — or the extent to which — the nonbiological mother's lack of this particular bond should have legal con-

law recognizes a parent-child relationship in the absence of a marital relationship, as long as there is a legally cognizable genetic link.⁵¹ Alternatively, when there is no genetic relationship, courts have recognized a parent-child relationship as long as the biological and nonbiological parents remain married. Thus, nonbiological motherhood challenges our conceptualization of parenthood by positing a parent-child relationship where there is neither a marital relationship with the biological parent nor a genetic link to the child.

A. *Genetic Relationship*

In cases where a genetic link exists between the parent and child, where no relinquishment has occurred and where a custodial biological parent has not married, the fact that parents are not married to one another does not necessarily affect parental status and rights. In *Stanley v. Illinois*,⁵² the Supreme Court overturned a state statute in which a child of an unwed father became a ward of the state upon the death of the mother.⁵³ The Court reasoned that an unwed father is entitled to the same due process afforded a father married to the child's mother.⁵⁴ Moreover, according to the Court, singling out unwed fathers for presumptive parental unfitness constitutes an equal protection violation.⁵⁵ The father in this case had raised his child along with the biological mother.⁵⁶ As a result of the father's combined biological status and functional parental role, the Court reasoned that his "private interest . . . undeniably warrants deference and, absent a powerful countervailing interest, protection,"⁵⁷ regardless of the father's unwed status. Thus, although the *Stanley* court recognized the importance of a biological relationship, it also considered the content of the parent-child relationship.⁵⁸

sequences. Through day-to-day care and nurturing, the nonbiological mother may establish as deep an emotional bond with her child.

51. "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." UNIF. PARENTAGE ACT § 2, 9B U.L.A. 296 (1973). See also, CAL. CIV. CODE § 7000-7018 (West 1983).

52. 405 U.S. 645 (1971).

53. *Id.* at 646.

54. *Id.* at 649.

55. *Id.* at 658.

56. *Id.* at 646.

57. *Id.* at 651.

58. *Id.* at 651.

In *Lehr v. Robertson*,⁵⁹ the Court was again faced with the due process and equal protection claims of an unwed father. In this case, a biological father objected to his child's adoption by the husband of the biological mother on the grounds that he had not been notified of the adoption proceeding. The Court in *Lehr* rejected his claim, despite his biological relationship to his child, on the grounds that he had not served in any way as the child's parent, in terms of a "custodial, personal, or financial relationship."⁶⁰ Thus, the Court reasoned that while biology provided the biological father with the opportunity to be the child's parent, biology in itself was not sufficient to oblige the Court to take him into account in his child's adoption proceeding.⁶¹ As a result, the Court allowed the nonbiological father to replace the biological father by virtue of his marriage to the biological mother and his adoption of her child.

Stanley and *Lehr* suggest that biology is a necessary but not sufficient component of parenthood. When biology is coupled with a social parent-child relationship, parental status will be recognized. The Court reasoned that "Parental rights do not spring fullblown from the biological connection between parent and child. They require relationships more enduring."⁶² Thus, the Court identified a distinction between a parent's biological and functional role and recognized the importance of the functional parental role in conferring parental status. In contrast, where only biology exists and a custodial biological parent has married, biology is superseded by marriage in conferring parental rights and status. A nonbiological lesbian mother could draw upon cases such as *Stanley* and *Lehr* to support her argument that the law ought to recognize her role as parent by virtue of the weight the Court placed on a parent's functional role, regardless of the existence of a biological relationship.

59. 463 U.S. 248 (1983).

60. *Id.* at 262.

61. The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interest lie.

Id. (footnote omitted).

62. *Id.* at 248, 260 (citing *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

B. *Marriage*

While a genetic relationship is one route to gain recognition of parental status, courts confer parenthood without a genetic relationship between parent and child when the nonbiological parent is married to the biological parent.⁶³ The power of marriage to create parental rights where none would otherwise exist underscores how nonbiological lesbian mothers are excluded; they are denied parental rights not simply because they lack a genetic relationship to their child, but because the law does not recognize the relationship in which the childbirth decision was made.

1. Extra-Marital Conception

In cases involving a married couple in which a child is possibly conceived outside the marriage, the husband of a childbearer may be presumed to be the child's legal father,⁶⁴ regardless of contrary biological evidence.⁶⁵ In *Michael H. v. Gerald D.*,⁶⁶ the Supreme Court upheld the constitutionality of a California law⁶⁷ which grants presumptive legal parental status to the husband of a child's mother.⁶⁸ As a result, Gerald D., the mother's husband, prevailed in a paternity claim made by Michael H. despite Michael H's persuasive evidence that he was the child's biological father.⁶⁹ *Michael H.* indicates that the legal and social relationship between a biological and nonbiological parent may be sufficient to establish parenthood to the exclusion of the other biological parent.

The Court in *Michael H.* rejected the possibility of shared fatherhood between Michael H. and Gerald D.⁷⁰ In the context of an intact marriage, there may be sound public policy reasons why the claims of those like Michael H. should be denied and why only one father — the husband of the child's mother — should be recognized. Such public policy considerations include the promotion of

63. See, e.g., CAL CIV. CODE § 7005(a) (West 1983).

64. CAL. EVID. CODE § 621(a) (West Supp. 1991). See also UNIF. PARENTAGE ACT § 4(a)(1), 9B U.L.A. 298 (1973).

65. *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2337 (1989) (Gerald, husband of child's mother, legally designated child's exclusive father despite blood tests showing a 98.07% probability that Michael was the child's father).

66. 109 S. Ct. 2333 (1989).

67. See *supra* note 62.

68. 109 S. Ct. at 2345.

69. *Id.* at 2345.

70. "California law, like nature itself, makes no provision for dual fatherhood." *Id.* at 2340.

family stability and the historical preference for legitimate children.⁷¹

A public policy rationale for upholding the constitutionality of presumptive parenthood readily applies to the lesbian mother context. Here, acknowledging two parents of the same sex upon the birth of a child who was jointly planned for and raised promotes the creation and stability of families. Assigning the nonbiological mother legal rights consistent with her functional status gives her both incentive for and protection of her parental role. Moreover, should the biological mother die, the child is assured of a stable home environment because the nonbiological mother would be entitled to custody.⁷² Thus, the reasoning in *Michael H.* could be applied to the lesbian nonbiological mother context to the extent that the lack of a genetic link is discounted to further the public policy goal of promoting stable families.

2. Remarriage

Like lesbian parent families, stepfamilies deviate from the norm of the traditional nuclear family in which a child lives with both biological parents.⁷³ A stepparent's lack of legal status is similar to that of the nonbiological lesbian mother. Here, too, a parent is denied parental legal rights consistent with her or his functional role.⁷⁴ Stepparents are precluded from adopting their stepchildren unless the biological, noncustodial parent of the same sex first consents.⁷⁵ Yet, where this consent is granted, the stepparent assumes

71. Schultz offers an additional explanation of the Court's decision in *Michael H.* She suggests that parenthood by legal presumption "may actually grow out of a normative aspiration The important issue becomes not who is, but who *should* be having sex with the mother: her husband." Shultz, *supra* note 6, at 317.

72. At present, in death cases, custody and visitation disputes frequently arise between the nonbiological mother and the family of the deceased. See, e.g., *In re Hatzopoulos*, No. D-54498 (Denver Juv. Ct. July 8, 1977); *In re Pearlman*, No. 87-24, 926 DA (Fla. Cir. Ct. Mar. 31, 1989); *In re Estate of Hamilton*, No. 24,961 (Vt. Prob. Ct. July 25, 1989) (cited in Polikoff, *supra* note 10, at 527-31).

73. In 1985, 6.8 million children lived in stepfamilies. U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, STUDIES IN MARRIAGE AND THE FAMILY 29 (Series P-23, No. 162, June 1989) (cited in Polikoff, *supra* note 10, at 476 n.74).

74. For example,

Questions about discipline, access to school records, financial support, educational and medical decisions, names, vacation planning, and religious upbringing are common in stepfamilies. Such uncertainties may create a strain in the new marriage as well as in stepparent-child relations that may already be burdened by feelings of envy, hostility, or guilt.

Bartlett, *supra* note 25, at 912.

75. See, e.g., CAL. CIV. CODE § 226.9 (West Supp. 1982).

complete parenthood rights and responsibilities. Thus, here again, the law recognizes a nonbiological parent by allowing adoption when she or he is married to the biological parent.

The relinquishment of the biological parent's rights as a condition for adoption by the biological partner's new spouse can be justified in the stepparent context. Here, two families, based on two marriages, must formulate a parenthood structure to accommodate both.⁷⁶ Because of the post-divorce context of these decisions, it is likely that such resolutions would often reflect as much a power struggle among the adults as a decision made in the best interest of the child.

In contrast to stepparent families, lesbian mothers do not present the problem of typically adversarial parties competing over the apportionment of parental rights. On the contrary, the nonbiological mother and biological mother have voluntarily chosen to share parental rights with one another. Thus, if consent of the biological parent coupled with relinquishment is sufficient in the stepparent context, consent without relinquishment should be allowed in the lesbian mother context, where one family is not being substituted for another.

III. LEGAL TREATMENT OF EMERGING CHALLENGES TO TRADITIONAL PARENTHOOD

The law has failed to adapt to the increased popularity of alternative means of conception. The techniques of alternative insemination and contract birthing defy traditional notions of how parenthood can be attained. Yet, rather than create new approaches to parenthood, the law's adherence to the primacy of marriage and genetics remains rigidly intact.

A. *Alternative Insemination*

Beginning in the late 1970s, alternative insemination became an increasingly popular means by which women could conceive.⁷⁷

76. For example, if shared parenting were permitted by statute, the question would still remain of who exactly should get to make what decisions. For example, who chooses the child's school, and who pays?

77. While alternative insemination has existed in the United States for over a hundred years, it has been used on a regular basis by those outside of nontraditional families, such as lesbians and unmarried heterosexual women, only in the last ten to fifteen years. Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1 (1981). An estimated 20,000 women a year are alternatively inseminated. *New Frontiers in Conception: Medical Breakthroughs and Moral Breakthroughs and Moral Dilemmas*, N.Y. Times, July

Like the nonbiological lesbian mother, the husband of a woman who has given birth to a child conceived through alternative insemination has no genetic relationship to the child. Yet, by virtue of his marriage to the child's mother he is afforded full parental rights "and treated in law as if he were the natural father"⁷⁸ of the child. In alternative insemination, as in extra-marital conception, marital status provides a mechanism by which a nonbiological parent becomes presumptively vested with parental rights, despite the absence of a genetic relationship.

B. *Contract Birthing*

Under a contract birthing agreement (popularly known as traditional surrogate motherhood),⁷⁹ a woman contractually agrees to be inseminated by a man's sperm, gives birth to a child, and then relinquishes the baby to the couple with whom she has contracted.⁸⁰ This form of conception challenges traditional notions of motherhood by severing the birthing process from the woman who will ultimately be the child's custodial mother. Under contractual birthing, the custodial mother has no genetic link to the child but is recognized as the child's mother based on the birthing contract and her marriage to the child's biological father.

As was widely reported in the popular press, *In re Baby M*⁸¹ involved a challenge by the childbearer, Mary Beth Whitehead, who sought to retain custody of the child rather than relinquish the baby to the Sterns, the couple with whom she contracted. In considering

20, 1980, § 6 (Magazine) at 14. Of this number, approximately 1,500 are unmarried. See Donovan, *The Uniform Parentage Act and Nonmarital Motherhood By Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193, 195 (1982-83).

78. See CAL. CIV. CODE § 7005(a) (West 1983).

79. "Traditional" surrogate birthing refers to an arrangement in which a woman is inseminated with a man's sperm, contributes her own ovum, and gives birth to the child. This procedure is distinguishable from gestational surrogacy in which a woman giving birth to a child contributes no genetic material. A number of commentators have critiqued the term surrogate motherhood. See Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, n.1 (1988) ("So the woman who has the baby is the surrogate mother. She is the substitute. But for what? For the real mother? No, she is the real mother . . . The woman who gets the baby is the substitute for that original mother who hands the baby over.") (quoting 173 Parl. Deb., H.L. (N.Y. 5th ser.)). See also THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 1 (1988) ("'[S]urrogate mother' is a misnomer because the woman is actually a 'surrogate wife' for the purposes of procreation."). *Id.* at 1 n.3. As a result, this Article uses the term contract birthing.

80. See Brophy, *A Surrogate Mother Contract to Bear A Child*, 20 J. FAM. L. 263 (1981-82).

81. 109 N.J. 396, 537 A.2d 1227 (1987).

the case, the New Jersey Supreme Court constrained itself to a unitary view of motherhood in which Baby M could have only one mother. The court held the surrogate contract was unenforceable as contrary to public policy and decided the case by treating it as a custody dispute between the biological mother, Mary Beth Whitehead, and the biological father, William Stern.⁸² The court awarded custody to William Stern based on the best interest of the child standard.⁸³ As a result, Elizabeth Stern, the nonbiological mother, became the custodial mother by virtue of her marriage to Mr. Stern.

In *Baby M*, the Sterns went outside their relationship in order to utilize the birth component they did not possess, in this case a healthy womb.⁸⁴ Similarly, in the lesbian mother context, two women go outside the relationship for the birth component they do not possess: namely, sperm. Thus, if, as the court in *Baby M* held, marriage between a man and woman confers a nonbiological mother parental rights in *Baby M* by permitting the nonbiological mother to adopt, a relationship between two women should similarly confer the right to adopt.

In alternative insemination and contract birthing cases, the lack of a genetic link is not fatal where there is a marital relationship between a biological and nonbiological parent. Also, the example of unwed fathers, as discussed above, illustrates that the lack of marital status is not fatal to the assertion of parental rights where there is a genetic link between the parent and child. Thus, genes are the anchor to parenthood where there is no marriage, and marriage is the anchor where there are no genes. These anchors are, respectively, physical and legal impossibilities for nonbiological lesbian mothers. Yet, if as a society we have accommodated married-nongenetic parents and unmarried-genetic parents, only a failure of imagination prevents the accommodation of nonmarried-nongenetic parents.

82. *Id.* at 457, 537 A.2d at 1246.

83. *Id.* The best interest of the child standard "requires that prior to creating a legal relationship where none has previously existed, the court must determine whether the adoption will be in the child's 'best interests.'" Patt, *Second Parent Adoption: When Crossing the Marital Barrier is in the Child's Best Interests*, 3 BERKELEY WOMEN'S L.J. 96, 101 (1987-88). While the "best interests of the child" is not defined by specific guidelines, in applying the standard to custody or visitation disputes, courts consider the needs and interests of the child rather than the adults involved.

84. In *Baby M*, Elizabeth Stern had multiple sclerosis and was concerned about her ability to carry a child to term without seriously endangering her health. 109 N.J. at 413, 537 A.2d at 1235.

IV. OPTIONS AVAILABLE TO LESBIAN NONBIOLOGICAL MOTHERS FOR ASSERTING PARENTAL RIGHTS

In the absence of an established path, nonbiological mothers have pursued a variety of approaches to asserting parental status. Initially, only traditional parental doctrines were available. More recently, second parent adoption — adoption without the biological parent's relinquishment of parental rights — has become available. These approaches provide varying degrees of parental rights. None, however, confer a lesbian nonbiological mother the parental status available to either her male heterosexual counterpart or her child's biological mother.

Of the available options, second parent adoption offers the most promising avenue for attaining parental rights. Yet, there are theoretical concerns associated with this method which point to the need for an alternative contract or hybrid approach. Additionally, the existence of judicial or contract methods of securing parental rights does not preclude a legislative solution.

A. *De facto Parenthood*

Under the doctrine of *de facto* parenthood, courts grant individuals standing to participate in proceedings concerning a child's welfare.⁸⁵ A *de facto* parent is "that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care."⁸⁶ Thus, courts look to the functional relationship between an adult and child and evaluate the existence of psychological parenthood to determine whether an individual may assert rights on behalf of a

85. *In re B.G.*, 11 Cal. 3d 679, 692, 523 P.2d 244, 253, 114 Cal. Rptr. 444, 453 (1974). California has:

three major bodies of law concerned with the child-custody decision: the law of guardianship of the person, the law of juvenile dependency, and what may be termed general custody law, applied most frequently in marriage dissolution proceedings. . . . In addition to these major actions, there are several other custody remedies, including a special cause of action for exclusive custody without marriage dissolution, suits in equity to determine custody, proceedings to terminate parental rights, adoption proceedings, and habeas corpus actions.

Bodenheimer, *The Multiplicity of Child Custody Proceedings — Problems of California Law*, 23 STAN. L. REV. 703, 704-05 (1971).

86. *In re B.G.*, 11 Cal. 3d at 692 n.18, 523 P.2d at 253 n.18, 114 Cal. Rptr. at 453 n.18 (citing *BEYOND THE BEST INTERESTS*, *supra* note 41).

child.⁸⁷ In assessing whether to confer the status courts consider whether:

(1) The child-*de facto* parent relationship is of long duration lasting . . . a minimum of six years . . . (2) The child *de facto* parent relationship involved reciprocal conduct between the child and the *de facto* parent which the child manifests expressly, or impliedly, that the other person is his parent — the child being of sufficient age and understanding to understand the meaning of the parental relationship . . . (3) [there would be] detriment to the child if left solely with the custodial parent.⁸⁸

These elements do not address the needs of a nonbiological mother wishing to assert parental rights upon the birth of her child. In that circumstance, a mother-child relationship has existed less than six years and as a consequence the child is too young to express to the court's satisfaction that a nonbiological mother is his or her parent; thus, a nonbiological mother would not meet the criteria for *de facto* status. Moreover, it is unlikely, especially in the lesbian mother context, that courts would identify any detriment to the child if he or she were raised solely by a biological mother.⁸⁹

To the extent that the court recognizes the reality of an individual's relationship with a child, *de facto* parenthood is a step in the right direction for lesbian mothers. It is, however, a very small step and one which should be pursued with caution. *De facto* status means only that an individual may be allowed to become a party to a legal proceeding. Thus, it falls far short of providing a nonbiological mother any permanent decision making authority with respect to the child. Consequently, it does not provide a nonbiological mother with rights and responsibilities anywhere near parity with the biological mother.

In addition to failing to provide adequate parental status for the nonbiological lesbian mother, use of the doctrine of *de facto*

87. The fact of biological parenthood may incline an adult to feel a strong concern for the welfare of his child, but it is not an essential condition; a person who assumes the role of parent, raising the child in his own home, may in time acquire an interest in "companionship, care, custody and management" of the child.

Id. at 692 (footnote omitted).

88. *In re Marriage of Halpern*, 133 Cal. App. 3d 297, 311, 184 Cal. Rptr. 740, 748 (1982).

89. See Rivera, *Our Straight Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1978-79). A recent case brought by a cadet dismissed from the United States Naval Academy due to his homosexuality underscores the judiciary's homophobia. The federal district judge presiding in this case denied he was biased and refused to disqualify himself despite his courtroom references to the plaintiff and others as "homos." N.Y. Times, Apr. 13, 1991, at A7, col. 1.

parenthood may be potentially harmful to lesbian families. Courts confer *de facto* parenthood status independent of any relationship between the *de facto* parent and the biological parent, with or without the biological parent's consent. As a result, nonparents, such as relatives, who may be hostile to the lesbian couple, have a means of asserting rights to a child. Thus, promoting the use of *de facto* parenthood may ultimately be harmful to lesbian families.

B. In loco parentis

The doctrine of *in loco parentis* creates parental rights and responsibilities in an individual who voluntarily provides child support or assumes custodial duties of a child. This status depends on that individual's continuing intent to care for and support a child. Thus, one acting *in loco parentis* may terminate her obligations at will.⁹⁰ *In loco parentis* arises most frequently in the stepparent context by conferring parental rights and responsibilities while the stepfamily is intact or providing a basis for gaining standing for child visitation upon the stepfamily's dissolution.

Unlike *de facto* parenthood, this status does not necessarily depend on the individual being a child's psychological parent. Instead, *in loco parentis* is satisfied when an individual "assume[s] the obligations incident to the parental relationship."⁹¹

In loco parentis status may not be terminated by the biological parent. Thus, parental rights attach to the *in loco* parent directly rather than based on the intermediary determination of the biological parent. In the lesbian mother context, the nonbiological mother's status would not be dependent on the continued consent of the biological mother. This feature of *in loco parentis* would be especially relevant when a nonbiological mother wished to continue her relationship with her child upon the dissolution of a relationship between the two mothers.

Although some features of the status are desirable, *in loco parentis* nonetheless inadequately addresses the needs of the lesbian nonbiological mother. Because *in loco parentis* status confers no fixed obligations, it does not serve the goal of fostering continuity and permanence in a lesbian mother household. Moreover, like *de facto* parenthood, *in loco parentis* operates independently of the *in loco* parent's relationship with the biological parent. Thus, here

90. See generally Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 42 (1984).

91. *Loomis v. State*, 228 Cal. 2d 820, 823, 39 Cal. Rptr. 820, 822 (1964).

too, even those with whom the biological mother did not wish to share parenting may be conferred this status.⁹²

C. *Equitable Parenthood*

An equitable parent is a nonbiological parent upon whom the court confers the rights and obligations of a biological parent based on that individual's conduct as a parent.⁹³ In *Atkinson v. Atkinson*,⁹⁴ the husband of a biological mother, who learned only at the divorce proceedings that he was not the child's biological father, argued that he was the equitable parent of the child born during the marriage.⁹⁵ The court stated that a husband will be considered an equitable parent under circumstances in which:

- (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.⁹⁶

Having found that the father met these criteria, the court deemed him the child's equitable parent.⁹⁷

Subsequent to the broad equitable parenthood standard articulated in *Atkinson*, in *Zuziak v. Zuziak*⁹⁸ the doctrine was significantly narrowed. In *Zuziak*, the court decline to confer equitable parenthood status to a stepmother in a child custody dispute. The

92. The efficacy of *in loco parentis* as a winning legal strategy for a lesbian nonbiological mother is also dubious. See, e.g., *Allison D. v. Virginia M., habeas corpus appeal dismissed* (Mar. 2, 1990) reported in N.Y. L.J., at 21 (Mar. 9, 1990) (denial of *in loco parentis* status for the purposes of standing in a custody dispute on the grounds that nonbiological mother did not meet statutory definition of parent despite court's recognition of the "close and loving relationship" between the nonbiological mother and her child). *Id.* at 23.

93. Equitable parenthood borrows from the doctrine of equitable adoption in intestate succession in which a child inherits from a nonbiological parent, such as a foster parent or stepparent, the same share as if he or she were the biological parent. Equitable adoption is permitted if "(1) the relationship began during the child's minority and continued throughout the parties' joint lifetimes and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier." CAL. PROB. CODE § 6408(b) (West 1983).

94. 160 Mich. App. 601, 408 N.W.2d 516 (1987).

95. Unlike California, Michigan does not statutorily confer presumptive paternity to a husband when a child is conceived during a marriage.

96. 169 Mich. App. at 608-09, 408 N.W.2d at 519.

97. *Id.* at 609, 408 N.W.2d at 520. The court analogized equitable parenthood to equitable adoption and reasoned that "it is only logical that a person recognized as a natural parent at death should have the same recognition in life." *Id.*

98. 169 Mich. App. 741, 426 N.W.2d 761 (1988).

court reasoned that *Atkinson* was limited to situations in which a parent "believed from the time of the child's birth that he was the natural father and only upon divorce discovered otherwise."⁹⁹

The notion of equitable parenthood serves as a useful theoretical construct for lesbian nonbiological mothers. The doctrine recognizes that parental roles can be assumed and earned rather than solely established through a genetic link. A nonbiological mother arguably would meet *Atkinson's* three prong test. In the nonbiological mother context, however, there could never be a false assumption of a biological link to her child as was found in *Atkinson*. Moreover, as in *Zuziak* which rejected the status, a nonbiological mother asserting equitable parenthood would be claiming status as an additional mother. In contrast, there was no parent of the same sex competing with the father in *Atkinson*. Thus, lesbian nonbiological mothers still must overcome the courts' resistance to expanding the conceptualization of "parents" beyond one involving only one male and one female parent.

State statutes may also limit the usefulness of the doctrine of equitable parenthood for lesbian nonbiological mothers. In California, for example, a stepparent will at most be granted visitation to the exclusion of joint or complete custody.¹⁰⁰ Thus, the court in *In re Marriage of Lewis and Goetz*¹⁰¹ held that even when a stepparent is considered an equitable parent, the court is without jurisdiction to grant more than visitation.¹⁰² Moreover, the statute specifically confines itself to stepparents rather than equitable parents in general, thus barring the claims of a lesbian nonbiological mother.

Even if equitable parenthood were available to lesbian nonbiological mothers, it nonetheless represents only a partial solution to the nonbiological mother's lack of legal parental rights. Like *de facto* and *in loco parentis* doctrines, equitable parenthood is conferred only when there is a dispute between a biological and nonbiological parent. As such, it is not an affirmative status. Instead, it is

99. *Id.* at 752, 426 N.W.2d at 766.

100. The superior court has jurisdiction . . . to award reasonable visitation rights to a person who is a party to a marriage that is the subject of the proceeding with respect to a minor child of the other party to the marriage, if visitation by that person is determined to be in the best interests of the minor child.

CAL. CIV. CODE § 4351.5(a) (West Supp. 1991).

101. 203 Cal. App. 3d 517, 250 Cal. Rptr. 30 (1988).

102. *Id.* at 519-520, 250 Cal. Rptr. at 33 ("Given the complex practical, social and constitutional ramifications of the 'equitable parent' doctrine, we believe that the Legislature is better equipped to consider expansion of current California law should it choose to do so.").

available only as a defensive posture when the biological parent has asserted that the other "parent" has no legal rights. Thus, it does not assist an intact couple who seeks legal recognition of their shared parenthood.

D. *Second Parent Adoption*

Under second parent adoption, a nonmarried partner of a biological parent adopts the biological parent's child without severing the biological parent's own parental rights and responsibilities.¹⁰³ This form of adoption has been granted in a number of states to provide parental rights to the heterosexual partner of a biological parent¹⁰⁴ and, more recently, to the same sex partner of a biological parent.¹⁰⁵ Approximately thirty-five second parent adoptions have been granted, all on the west coast. Of these, twenty have occurred in California.¹⁰⁶ In contrast to *de facto* parenthood and *in loco parentis*, second parent adoption requires the consent of the biological parent. Additionally, this form of adoption applies the best interest of the child standard to ensure that the child would benefit from the adoption.

Second parent adoption is an appealing option because it recognizes that parenthood is as much a manifestation of a relationship between adults as it is between adult and child. Moreover, this form of adoption confers the nonbiological mother with full parental rights, both within the confines of the family and with respect to public recognition.

Yet, second parent adoption is not ideal because it accepts the premise that a nonbiological mother must prove her motherhood credentials through the best interest of the child standard. This standard may be to the detriment of the nonbiological mother.¹⁰⁷

103. See generally Zucherman, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729 (1986). See also Patt, *supra* note 83.

104. See, e.g., *In re Adopting Parent*, No. A-10169 (Cal. Super. Ct. Apr. 25, 1985); *In re D.J.L.* No. A-28345 (Cal. Super. Ct. Apr. 17, 1984) (cited in Patt, *supra* note 83, at 98 n.12).

105. See, e.g., *In re Adoption Petition of N.*, No. 18086 (Cal. Super. Ct. filed Mar. 11, 1986); *In re Adoption of a Minor Child*, No. 1-JU-86-73 (Alaska Super. Ct. Feb. 6, 1987); *In re Adoption of M.M.S.A.*, No. D-8503-61930 (Or. Cir. Ct. Sept. 4, 1985) (cited in Patt, *supra* note 83, at 98 n.13). See also *In re E.B.G.*, No. 87-5-00137-5 (Wash. Super Ct. Mar. 29, 1989) (cited in Polikoff, *supra* note 10, at 523).

106. Telephone interview with Maria Gil de Lamadrid, Staff Attorney, National Center for Lesbian Rights (Mar. 15, 1991).

107. The vagueness of the statute also may give the courts too much discretion. For example, in California the relevant statute states that "[i]n making a determination of

For example, a court uncomfortable with lesbian families could easily find that the child's best interests are adequately satisfied by one mother rather than two.¹⁰⁸ Thus, the best interest of the child standard may only be workable in the lesbian mother context where there could be assurance of a lack of judicial bias against the nonbiological lesbian mother. Additionally, the best interest of the child standard perpetuates the imbalance between the biological and nonbiological mother by requiring the nonbiological mother to go through the extra step of proving her motherhood credentials.

Another criticism of second parent adoption is that it requires lesbians to subject themselves to the scrutiny of social service agencies who make recommendations to the family court.¹⁰⁹ This problem may be especially severe in states that are particularly hostile to gay and lesbian rights.¹¹⁰ It is also argued that nonbiological lesbian mothers would have little incentive to go through this legal process since their day-to-day parenting reality is unaffected by their lack of legal parental status. This view, however, belies the parenting handicaps and emotional toll described above which stem from the lack of legal recognition.¹¹¹ Moreover, from the perspective of social change, so long as lesbian mothers avoid exposure, social service agencies who make recommendations regarding adoption and the courts will remain shielded from and ignorant of the reality of lesbian parenthood. Nevertheless, many lesbians may in fact wish to avoid exposure and judicial involvement. Thus, a more desirable solution would allow lesbians to assert parental rights extra-judicially.

E. *Statutory Reform*

Ideally, the legislature is the venue in which to establish legal recognition of nonbiological mothers. With a definition of parenthood which included functional parents such as lesbian nonbiological mothers, lesbian couples would not have the burden of going to court in order to gain parental recognition. Such a law would define parenthood apart from a genetic relationship or mari-

the best interest of the child . . . the court shall, among any other factors it finds relevant, consider all of the following: (a) The health, safety, and welfare of the child, (b) Any history of abuse . . . against the child . . . (c) The nature and amount of contact with both parents. CAL. CIV. CODE § 4608(a)-(c) (West Supp. 1991).

108. See Rivera, *supra* note 89.

109. Polikoff, *supra* note 10, at 526.

110. *Id.* at 526.

111. See *supra* note 9 and accompanying text.

tal status. For example, Oregon law recognizes parental rights when an adult has formed a "child-parent" relationship.¹¹²

Rather than define a parent-child relationship as based solely on genetics or a marital relationship with a biological parent, under Oregon law parenthood refers to:

a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action . . . and in which relationship a person having physical custody of a child or residing in the same household as the child, supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs.¹¹³

By recognizing a functional parent-child relationship, Oregon law provides a basis for lesbian couples to assert coextensive parental rights. Intact lesbian mother couples in Oregon are using this statute to obtain joint custody of their children.¹¹⁴

A legislative solution would both protect and legitimize private parenting arrangements and ensure public recognition of the nonbiological mother's status. Yet, realistically, legislatures nationwide are not likely to undertake statutory reform of the laws regarding parenthood. As a result, the courts remain the forum for the nonbiological mother's assertion of parental status.

F. Contract

Contract law provides an extra-judicial means for the nonbiological mother to secure parental rights. Under contract law, private parties may contract freely without undue government interference¹¹⁵ as long as the contract does not violate public policy¹¹⁶ and is not the result of undue influence.¹¹⁷ A contract be-

112. OR. REV. STAT. § 109.119 (1990).

113. OR. REV. STAT. § 109.119(4) (1990). *Cf.* UNIFORM PARENTAGE ACT (UPA) (Parent-child relationship refers to the relationship between a child and "(1) the natural mother . . . (2) the natural father . . . (3) an adoptive parent . . . established by proof of adoption"). UNIF. PARENTAGE ACT § 3, 9b U.L.A. 279 (1973). The Uniform Parentage Act has been codified in eighteen states, including California. *See, e.g.*, CAL. CIV. CODE § 7003 (West 1983).

114. *See, e.g.*, In re L.O. & E.W., No. 15-89-0096 (Ore. Cir. Ct. Feb. 7, 1989) (cited in Polikoff, *supra* note 10, at 489 n.139).

115. E. FARNSWORTH, CONTRACTS § 5.1 (1982) ("The principle of freedom of contract rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements.").

116. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1979).

tween lesbian mothers promotes rather than violates public policy by protecting the expectations of the parties and encouraging the formation and stability of families.

Under such a parental rights agreement, the biological mother recognizes her partner's parental status as equal to her own. In return, the nonbiological mother agrees to assume all the parental responsibilities attendant to the acquisition of parental rights. This contract would bind the parties even in the event of the relationship's dissolution.

Contract law offers lesbian mothers an advantage over such solutions as *in loco parentis* and *de facto* parenthood in so far as it focuses on the relationship of the parties as a means of securing parental rights. Contract is also preferable to second parent adoption because it does not place the burden on the nonbiological mother to prove that her parenthood is in the child's best interest. Moreover, because its terms are drafted specifically for each couple, contract best reflects the wishes of each lesbian couple.¹¹⁸ A contract approach also allows a lesbian couple to avoid the scrutiny of the judiciary and social service agencies. In so doing, they would not have to tailor their behavior or presentation to best accommodate these institutions.¹¹⁹

Such a contract would be comprised of three parts: first, rights and responsibilities during the relationship; second, parental rights and responsibilities in the event of the relationship's dissolution; and third, the nonbiological mother's rights and responsibilities in the event of the biological mother's death. In order to ensure that outside institutions such as hospitals and schools recognize the nonbiological mother's authority, it would be essential that such a contract explicitly term the nonbiological mother as a parent, rather than merely enumerate a list of rights which she may exercise.

Ordinarily, in the event of a contract breach, money damages are awarded. Yet, in the area of a parent-child relationship, a monetary remedy would be inappropriate. Money would not compen-

117. *Id.* at § 177.

118. A contract solution would also benefit other nontraditional families such as stepparent families.

119. Polikoff discusses the experience of lesbians in the courts:

A lesbian mother must portray herself as being as close to the All-American norm as possible — the spitting image of her ideal heterosexual counterpart. . . . When we construct courtroom scenarios that deny our differences from heterosexual society, we quickly forget that our strength and our promise are rooted in those very differences.

Polikoff, *supra* note 20, at 325–26.

sate for the loss of a parent-child relationship nor make the breached party whole.¹²⁰ Thus, should the relationship between the mothers end and a breach of the parental rights agreement occur, the appropriate remedy would be specific performance in the form of shared custody or visitation.¹²¹

To determine the parameters of a specific performance remedy, a contract could contain a provision calling for mediation in the event of a custody or visitation dispute. Such a provision would parallel laws in many states which provide for mandatory mediation in these types of disputes.¹²²

While a parental rights agreement addresses the private arrangements between the biological and nonbiological mother, it does not provide the nonbiological mother with public recognition and validation. If nonbiological lesbian mothers are ever to achieve legitimacy, a solution conferring parental rights must serve a public function.¹²³

120. A breach of a parental rights agreement is distinguishable from other situations in which the loss of a child is compensated through money damages. For example, in loss of consortium or emotional distress claims associated with the death of the child, the court ascribes a monetary value to a child's life. In such cases, money serves as a substitute for the impossibility of restoring a parent-child relationship and bringing a child back to life. In contrast, in lesbian mother custody cases, the parent-child relationship is capable of being restored.

121. Specific performance will be awarded when monetary damages are not "adequate to protect the expectation interest of the injured party." *See* RESTATEMENT (SECOND) OF CONTRACTS § 359(1)(1981).

122. *See, e.g.*, CAL. CIV. CODE § 4351.5(c).

123. Family registration offers a potential means of attaining public recognition of the contractual arrangement. In the same way that domestic registration and partnership laws are an alternative to marriage for those who are not permitted to marry or choose not to marry, family registration could serve to recognize and protect family structures in lieu of traditional family and adoption.

In California, The Family Diversity Project is exploring the use of a law originally intended for fraternal associations as a means whereby nontraditional families may register to gain recognition of their family status. "Any association . . . may register in the Office of the Secretary of State a facsimile or description of its name." CAL. CORP. CODE § 21301 (West 1977). "Association" is defined as "includ[ing] any lodge, order, beneficial association . . . or any other society, organization or association." CAL. CORP. CODE § 21300 (West 1977). Similar statutes exist in Michigan, New Jersey, Virginia, West Virginia, and Wisconsin. *N.Y. Times*, Dec. 17, 1990, at A14, col. 3.

While at present this registration provides only symbolic recognition of nontraditional families, it presents a potential avenue for legal recognition as well. Theoretically, family registration could have the same force of law as domestic partnership and registration laws.

CONCLUSION

This Article has sought to demonstrate that present law and the options available to assert parental rights are inadequate for the nonbiological lesbian mother. Yet, the available options do contain positive elements which should be incorporated into a hybrid solution. Underlying any solution should be proof of the nonbiological mother's original and ongoing intent to assume a motherhood role.

De facto, in loco parentis, and equitable parenthood provide the analytical bases for a solution premised on the theory that a nonbiological parent may assume parental rights and responsibilities based on her relationship with her child. These theories, however, confer parental status based only on a *retrospective* recognition of the nonbiological mother's parental role. In contrast, a hybrid solution combining contract and adoption would provide the mechanism for the *prospective* attainment of parental rights and status. A parental rights contract would establish the private arrangements between a lesbian couple. At the same time, public recognition of the nonbiological mother's parental role would be derived from the doctrine of second parent status, borrowed from second parent adoption. Yet, unlike second parent adoption as currently administered, under this hybrid solution, second parent status would be derived from a contract and from the mothers' commitment to one another rather than through the best interest of the child standard. By combining contract and adoption law, a lesbian couple would be able to secure equal parental rights from the time of their child's birth.

Lesbian families are different in form, if not in substance, from traditional families and thus require a reconceptualization of parenthood. Emphasizing the distinctiveness of such families provides an opportunity to explore new solutions rather than torture existing doctrine to accommodate unforeseen parenting arrangements. Understanding and accepting their similarities would enable those unfamiliar or uncomfortable with — or indeed resistant to — lesbian families to recognize the commonality of the parental experience. Only in this way will longstanding attitudes regarding parenthood be challenged and lesbian families allowed to flourish free of legal constraints.